## TABLE OF CONTENTS


Page

Petition for Writ of Certiorari:

I. Prayer ..... 1
II. Opinions Below ..... 2
III. Jurisdiction ..... 2
IV. Question Presented ..... 2
V. Statutes Involved ..... 2
VI. Statement ..... 3
VII. Specification of Errors to be Urged ..... 5
VIII. Reasons for Granting Writ ..... 6
A ..... 6
B ..... 9
C ..... 10
IX. Conclusion ..... 10

Appendix A:

Title 28, United States Code Annotated, Section 1331. 11
Title 28, United States Code Annotated, Section 1337. 11
Title 49, United States Code Annotated, Section 1, Paragraph (18) ..... 11
Title 49, United States Code Annotated, Section 1, Paragraph (19) ..... 12
Title 49, United States Code Annotated, Section 1, Paragraph (20) ..... 12

Appendix B:

*L. Singer & Sons, et al.*, v. *Union Pac. R. Co.*, 311 U. S. 295 (Principal opinion) ..... 14
*Detroit & M. Ry. Co.* v. *Boyne City, etc., Co.*, 286 Fed. 540 ..... 8
*Lucking* v. *Detroit & Cleveland Nav. Co.*, 265 U. S. 346.. 31

## Table of Cases Cited


| | Page |
|---|---|
| *Detroit & M. Ry.* v. *Boyne City, etc., Co.*, 286 Fed. 540.... | 8 |
| *Farmers Grain Co., et al.*, v. *Toledo P. & W. R. R., et al.*, 332 U. S. 748, 66 Fed. Supp. 845, 158 Fed. (2d) 109..... | 8 |
| *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499.. | 9 |
| *Interstate Commerce Commission* v. *Railway Labor Executives Association*, 315 U. S. 373..... | 7 |
| *L. Singer & Sons, et al.*, v. *Union Pac. R. Co.*, 311 U. S. 295..... | 5 |
| *Louisville & Nashville R. R. Co.* v. *Rice*, 247 U. S. 201..... | 9 |
| *Lucking* v. *Detroit and Cleveland Nav. Co.*, 265 U. S. 346... | 9 |


---

## Statutes Cited


| | |
|---|---|
| Title 28, United States Code Annotated, Section 1254 (1) | 2 |
| Title 28, United States Code Annotated, Section 1331... | 3 |
| Title 28, United States Code Annotated, Section 1337... | 3 |
| Title 49, United States Code Annotated, Section 1 (18).. | 4 |
| Title 49, United States Code Annotated, Section 1 (19).. | 4 |
| Title 49, United States Code Annotated, Section 1 (20).. | 4 |
| Title 49, United States Code Annotated, Section 1 (21).. | 4 |

IN THE

# Supreme Court of the United States

OCTOBER TERM
1950

---

No. ....

---

LUTHER E. JOHNSON AND L. RAY TEMPLE,
PETITIONERS,

*versus*

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, RESPONDENT.

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

---

## I. PRAYER.

Petitioners pray that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on April 10, 1951.

## II. OPINIONS BELOW.

The opinion of the District Court was not published, but appears in the Record at Page 31. The opinion of the Court of Appeals for the Fourth Circuit (R. 102) is reported in *188 Fed. (2) 458.*

## III. JURISDICTION.

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 10, 1941 (R. 104) and the jurisdiction of this Court is invoked under *Title 28, U. S. C. A. Section 1254 (1).*

## IV. QUESTION PRESENTED.

The question here presented is whether a United States District Court has jurisdiction to hear and determine a complaint for an injunction to enjoin an alleged abandonment of a portion of a line of railroad engaged in interstate commerce without said railroad having first obtained a certificate that the present or future public convenience and necessity permits such an abandonment from the Interstate Commerce Commission, hereinafter designated I. C. C., when the said complaint for injunction is brought by a plaintiff who is a regular user of that portion of the line of railroad alleged to have been abandoned and a plaintiff who is an employee of the railroad and employed in the operation of the line of railroad alleged to have been abandoned and who alleges that he will suffer damages in excess of Three Thousand Dollars ($3,000.00) as a result of the alleged abandonment.

## V. STATUTES INVOLVED.

The pertinent statutory provisions are printed in Appendix A, *infra,* at pages 11, 12.

## VI. STATEMENT.

On June 1, 1950, petitioners herein filed in the United States District Court at Norfolk, Virginia, a sworn motion for preliminary injunction (R. 1), which pleading was later amended to be captioned Complaint (R. 24). Petitioners alleged under oath that the Chesapeake and Ohio Railway Company, hereinafter designated C&O was abandoning that portion of its line of interstate railroad between Portsmouth, Virginia, Norfolk, Virginia, and Newport News, Virginia. The aforesaid line of railroad was then operated via ferry. The petitioner, Luther E. Johnson, alleged under oath that he was a member of the crew of the ferry steamer "VIRGINIA", used in the operation of that portion of the line of railroad that was to be abandoned, and that as a result of the abandonment he would lose his job, his seniority rights and retirement benefits pursuant to the provisions of the Railroad Retirement Act and that as a result of his loss of earnings and other rights he would suffer damages in excess of Three Thousand Dollars ($3,000.00) (R. 3). Petitioner, L. Ray Temple, alleged under oath that he was a resident of Virginia and a user of the C&O rail facilities, including that portion of the line to be abandoned, and that he would be irreparably harmed and deprived of beneficial transportation facilities as a result of the abandonment of that portion of the C&O rail facilities between Portsmouth, Norfolk and Newport News, Virginia (R. 4). Petitioners invoked the jurisdiction of the Court as granted by *Title 28, U. S. C. A., Sections 1331, 1337**, independently of the jurisdictional grant set out in *Title 49, U. S. C. A. Section 1, Paragraph 20.* The District Court heard the petitioners' motion for preliminary injunction on the verified allegations of the petitioners and

---

**Section 1337 of Title 28, U. S. C. A.*, was inadvertently referred to in the pleadings as *Section 1336 of Title 28 U. S. C. A.*

the verified answer of the C&O, and thereafter found as a matter of fact (R. 13) that petitioner, Johnson, was an employee of the C&O holding seniority rights on that portion of its line of railroad to be abandoned, and that petitioner, Temple, was a resident of the Commonwealth of Virginia and a user of respondent's line of railroad to be abandoned. The Court concluded (R. 17) that it had jurisdiction of the parties and the subject matter presented by petitioners' verified motion for preliminary injunction and defendant's verified answer as a matter arising under *Section 1, paragraph 18 to 21, inclusive of the Interstate Commerce Act, Title 49, U. S. C. A., Section 1, Paragraphs 18 to 21, inclusive*, but denied petitioners' motion for preliminary injunction on the merits. On September 28, 1950, petitioners' complaint for injunction came on for final hearing, after which the Court verified its findings of fact entered on the motion for preliminary injunction (R. 33) and found as a fact that petitioner, Johnson, was an employee possessing seniority rights on that portion of the line of railroad to be abandoned and that petitioner, Temple, was a user of the line of railroad to be abandoned and *was a party in interest.* The District Court again concluded (R. 38) that it had jurisdiction of the parties and the subject matter. The C&O submitted drafts of the above findings and conclusions, which were adapted by the District Court and at no time questioned the fact that petitioners were interested parties and that the District Court had jurisdiction of the parties and the subject matter. Petitioners noted an appeal from the ruling of the District Court that the C&O's discontinuance of service to Portsmouth, Virginia, from Newport News and Norfolk, did not constitute an abandonment within the contemplation of *Title 49, U. S. C. A., Section 1 (18)*. No appeal was taken to the lower court's finding that it had jurisdiction and that the petitioners were parties in interest, within the contemplation of *Title 49, U. S. C. A., Section 1 (20)*, nor were these questions raised in the C&O's brief on appeal.

The Court of Appeals in a per curiam opinion, *188*

*Fed.* (*2*) *458*, vacated the judgment of the District Court and directed that the case be remanded to the District Court with directions for that Court to dismiss the complaint for injunction because it did not have jurisdiction to hear the matter in the first instance (R. 102). The Court of Appeals did not consider the case on its merits, which was the purpose of the appeal, but held that the Court did not have jurisdiction because the petitioners, as individuals, could not be parties in interest. This holding relied upon the concurring opinion of Mr. Justice Frankfurter in *L. Singer & Sons, et al.* v. *Union Pac. R. Co.*, 311 U. S. 295, 305, and made no mention of this Court's principal opinion in said case. The lower court held, in effect, that a Federal Court has no jurisdiction of a complaint of any *individual* for an injunction to restrain a carrier from unlawfully abandoning a portion of its line of railroad.

## VII. SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals for the Fourth Circuit erred:

(1) In holding that petitioners, one an employee who would lose his job and other rights as a result of the alleged unlawful abandonment, and the other a user of the line of railroad to be abandoned, who would be deprived of beneficial transportation facilities, were not parties in interest within the contemplation of *Title 49, U. S. C. A., Section 1* (*20*), (Appendix A, *infra*, page 12).

(2) In failing to hold that the District Court had jurisdiction of the case as it applied to petitioner, Luther E. Johnson, as an action wherein the matter in controversy exceeded the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs and arose under the Constitution, treaties, or laws of the United States pursuant to *Title 28, U. S. C. A., Section 1331* (Appendix A, *infra*, page 11).

(3) In failing to hold that the District Court had jurisdiction of the parties and subject matter as a case or proceeding arising under an Act of Congress regulating Commerce pursuant to *Title 28, U. S. C. A., Section 1337* (Appendix A, *infra*, page 11).

(4) In vacating the judgment of the District Court on the ground that the District Court did not have jurisdiction.

## VIII. REASONS FOR GRANTING WRIT.

### A.

The decision of the Court below in the instant case, in effect, holds that no individual citizen who is a user of and benefits from the use of a line of railroad to be abandoned without the authority of the I. C. C. can exercise his right to enjoin the unauthorized action of the railroad, nor can an individual who is employed on a line of railroad to be abandoned without authority of the I. C. C. seek to have this unlawful action enjoined on the ground that the abandonment deprives him of a job and the protection that would accrue from having the I. C. C. impose terms and conditions for his benefit as a displaced worker in the event an abandonment was authorized, because such parties are not parties in interest.

The Court below interpreted the opinion of this Court in the case of *L. Singer & Sons, et al.* v. *Union Pac. R. Co.*, 311 U S. 295, 305 (Appendix B, *infra*, pages 14-20), as holding that individuals, such as petitioners, could not be parties in interest. Such a conclusion conflicts with this Court's principal opinion in the *Singer* case, *supra*.

.In the *Singer* case, this court was concerned with an alleged unlawful extension of a line of railroad and found that the extension did not directly affect either Singer & Sons, as individuals, or Kansas City, Missouri, as a city. This Court stated at page *304 of 311 U. S.* that:

"* * * A mere extension to the plant of a competitor which in no other way affects the complaining parties in no proper sense brings about a material change in the transportation system directly affecting their peculiar interests which they have the right to prevent by suit."

This Court did not hold, as the court below infers, that no individual, regardless of his interest, could be a party in interest, but on the contrary held at page *304 of 311 U. S.*:

"* * * *An individual may have some special and peculiar interest which may be directly and materially affected by alleged unlawful action.* See *Detroit & M. Ry.* v. *Boyne City, etc., Co.* (D. C.), 286 Fed. 540. *If such circumstances are shown he may sue; he is then 'party in interest' within the meaning of the statute. In the absence of these circumstances he is not such a party.*" (Italics supplied.)

Individuals could be possessed of no greater interest than possessed by the petitioners herein. Petitioner, L. Ray Temple, was a user of the facility abandoned and his or similar use of such facility was the justification of the operation of the line in the first instance. The determination of whether he is to be deprived of the use of these facilities is the very purpose of the requirement of *Title 49, U. S. C. A., Section 1 (18)*. If the abandonment is unlawful petitioner, Johnson, an employee, is being deprived of property rights which he is entitled to protect. If after a hearing before the I. C. C. the public interest permits such an abandonment, then petitioner, Johnson, as an affected worker, would be entitled to have the I. C. C. attach terms and conditions for his benefit as a displaced employee. See *Interstate Commerce Commission* v. *Railway Labor Executives Association*, 315 U. S. 373.

The decision of the Court below conflicts with the opin-

ion of the District Court for the Eastern District of Michigan in *Detroit & M. Ry.* v. *Boyne City, etc., Co.*, 286 Fed. 540 (Appendix B, *infra*, pages 21-30), which decision was approved by this Court in the *Singer* case, *supra*. In the cited case, one of the plaintiffs involved was an individual citizen who complained of an unlawful extension of a line of railroad because the extension would pass over certain land owned by him. The District Court stated at page 548:

> "I am of the opinion that the plaintiff in each of these suits is 'a party in interest' within the meaning of paragraph 20 of said section, and as such entitled to the relief prayed, * * *"

In the instant case the C&O's alleged unlawful abandonment has affected petitioner, Luther E. Johnson's, property rights, as were those of the individual citizen in *Detroit & M. Ry.* v. *Boyne City, etc., Co., supra*.

See also the holding of the Court of Appeals for the Seventh Circuit in *Farmers Grain Co., et al.* v. *Toledo P. & W. R. R., et al.*, 66 Fed. Supp. 845, 158 Fed. (2d) 109, 118, which is apparently in conflict with the opinion of the Fourth Circuit in the instant case. In *Farmers Grain Co., et al.* v. *Toledo P. & W. R. R., et al., supra*, a complaint for injunction was brought by certain individual shippers along the carrier's right-of-way for an injunction to prevent the abandonment of operation that would result from a strike of railroad employees. The Seventh Circuit affirmed that the lower court had jurisdiction. This Court granted *certiorari* apparently for the purpose of examining the labor question involved, but in a per curiam opinion, *332 U. S. 748*, held on motion of the railroad, agreed to by the Brotherhood of Locomotive Firemen and Enginemen that the question had become moot and the case was ordered dismissed. Neither this Court nor the lower courts doubted the jurisdiction of the lower court to entertain the complaint for injunction sought by the individual plaintiffs.

B.

Jurisdiction in the *Singer* case, *supra*, was based solely on the provisions of *Title 49, U. S. C. A., Section 1 paragraphs 18, 20 and 21.* Jurisdiction in the instant case was in addition thereto, based upon the provisions of *Title 28, U. S. C. A., Sections 1331 and 1337.* The decision of the Court below (R. 102) denying the jurisdiction of the District Court under these sections is in conflict with this Court's holding in *Lucking* v. *Detroit and Cleveland Nav. Co.*, 265 U. S. 346 (Appendix B, *infra*, pages 31-32), and cases cited therein.

In the *Lucking* case, *supra*, an individual citizen sued the Detroit and Cleveland Navigation Company seeking an injunction to restrain it from abandoning the operation of a steamer. The complaint alleged that Lucking had been in the past and that he desired to become in the future a passenger and shipper on the Navigation Company's steamer and if the company was permitted to abandon its steamer, Lucking would be deprived of its transportation service. The District Court held that the suit involved a federal question and was within its jurisdiction. This Court affirmed the jurisdictional point at page *349 of 265 U. S.*, stating:

> "On the allegations of the complaint, the suit is one arising under the laws of the United States, and particularly the Act to Regulate Commerce. Its decision involves the construction and application of certain provisions of that Act. It was rightly held in the Courts below that the district court had jurisdiction."

In the above decision this Court confirmed its holding in *Louisville & Nashville R. R. Co.* v. *Rice*, 247 U. S. 201, and *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499.

Since the instant case arose under an Act of Congress Regulating Commerce, the district court had jurisdiction regardless of the amount involved, but it is to be noted that

the complaint so far as it related to the petitioner, Luther E. Johnson, alleged in addition that he suffered damages in excess of Three Thousand Dollars ($3,000.00), and accordingly, the district court had original jurisdiction under the provisions of *Title 28, U. S. C. A., Section 1331.*

C.

The effect of the decision of the Court below is to deprive every individual citizen who may in the future be directly affected by the wrongful deprivation of transportation service owed to the citizen by a carrier, from having his day in Court as was intended by the Acts of Congress heretofore referred to. To permit the lower court decision to stand without review by this Court would be taken as an approval by this court of the lower court's interpretation of this Court's opinion in *L. Singer & Sons, et al.* v. *Union Pac. R. Co.,* 311 U. S. 295, that no individual citizen can be a "party in interest" within the contemplation of *Title 49, U. S. C. A., Section 1 (20)*, irregardless of the fact that the individual citizen is directly affected by the unlawful abandonment undertaken by a carrier. Such a far reaching conclusion, even if correct, should be the product of this Court and not a lower court.

## IX. CONCLUSION.

For the foregoing reasons this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

R. ARTHUR JETT,
Of Counsel for Petitioners

June 19, 1951.

JETT, SYKES & HOWELL,
701 Citizens Bank Building,
Norfolk 10, Virginia.

# APPENDIX A.

*Title 28, United States Code Annotated, Section 1331.*

"Federal question; amount in controversy

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States. June 25, 1948, c. 646, 62 Stat. 930."

*Title 28, United States Code Annotated, Section 1337.*

"Commerce and anti-trust regulations

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. June 25, 1948, c. 646, 62 Stat. 931."

*Title 49, United States Code Annotated, Section 1, Paragraph (18).*

"*Extension or abandonment of lines; certificate required.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier

by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."

*Title 49, United States Code Annotated, Section 1, Paragraph (19).*

"*Application for certificate of commission; notice and hearing.* The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the commission may from time to time prescribe, and the provisions of this chapter shall apply to all such proceedings. Upon receipt of any application for such certificate the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates."

*Title 49, United States Code Annotated, Section 1, Paragraph (20).*

"*Issuance of certificate by commission; unlawful extension or abandonment of lines.* The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certifi-

cate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.''

# APPENDIX B.

*L. Singer & Sons, et al.* v. *Union Pac. R. Co.*, 311 U. S. 295.*

"Mr. Justice McREYNOLDS delivered the opinion of the Court.

"Undertaking to proceed under Paragraphs 18, 20 and 21, Section 402, Transportation Act, 1920, 41 Statutes 456, 477, U. S. C. Title 49, §1, 49 U. S. C. A., §1, petitioners, by bill filed December 30, 1938, in the United States District Court, Western District of Missouri, 26 F. Supp. 721, asked a decree enjoining respondent from constructing or operating an alleged extension.

"The bill describes them thus:—'Plaintiffs are engaged in the business of buying and selling at wholesale and retail, fruits, vegetables and other food products within and adjacent to the so-called City Market of Kansas City, Missouri, located at and near the intersection of Fourth and Walnut Streets in said City, or are directly interested in or connected with said business. Said market has been in existence at said location for more than seventy-five years serving greater Kansas City and vicinity as a wholesale and retail produce market, and also serving numerous territories in other states to and from which perishable and other produce bought and sold in said market is transported. The City of Kansas City, Missouri, is now engaged in the construction of new wholesale and retail market buildings and facilities in said vicinity at a cost of approximately $500,000.00. Said market is now and for a long period of time has been served by existing transportation

*Only the principal opinion is here printed. The concurring and dissenting opinions are omitted.

facilities of various trunk line railroads, and said existing transportation facilities are suitable, convenient and adequate to meet the requirements of the market. The market is easily accessible to its customers through the facilities of said railroads and also by the use of streets and hard-surfaced highways radiating in every direction therefrom.'

"Answering, the respondent alleged that petitioners were not parties 'in interest' within Paragraph 20, Sec. 402, Transportation Act and had no right to sue. The District Court sustained this defense and dismissed the bill. Upon appeal its action was affirmed. The matter is here by *certiorari.*

"The Circuit Court of Appeals, 8 Cir., 109 F. (2d) 493, 495, made the following summation of the bill—'The complaint of the plaintiffs shows that they are commission merchants doing business on the Kansas City, Missouri, produce market, an old and well-established market which adequately serves the consuming public in its vicinity and receives produce from, and ships produce to other states; that Kansas City, Missouri, is now engaged in constructing new market buildings for this market at a cost of about $500,000; that the market has suitable and adequate transportation facilities of all kinds; that the adjoining city of Kansas City, Kansas, proposes to build and is building a "food Terminal" or produce market on a track of land which it owns, at a cost of about $4,000,000, of which $1,710,000 is a grant from the Public Works Administration of the United States, and that the balance of the necessary funds will be procured by a sale of the City's bonds to the defendant railroad company; that the defendant proposes, at an expense of some $500,000, to furnish trackage to serve this Kansas City, Kansas, market; that this trackage constitutes an extension of the defendant's lines of railroad, for the construction of which it has procured no certificate of convenience and necessity from the Interstate Commerce Commission as required by law; that the construction and operation of the proposed extension in Kansas City, Kansas, will adversely

affect and will destroy the business and properties of the plaintiffs and the large investments which they have made in and adjacent to the Kansas City, Missouri, produce market; that it will create an unnecessary and uncalled for rival market at an inconvenient place without creating any more produce to be handled or any more customers to be served; that it will result in the unnecessary duplication of railroad facilities at a cost of $500,000 without increasing the amount of freight to be handled; that it will divert traffic from other railroads which are now adequately handling the traffic to the Kansas City, Missouri, produce market, and will cause destructive competition between the defendant and other railroads and will cause a wasteful and needless expenditure of money by the defendant; that for "each and all of the reasons aforesaid, the construction and operation, or the construction, or the operation of the said extension or extensions of railroad by the defendant to said proposed produce market in Kansas City, Kansas, will directly and adversely affect the property interests of the plaintiffs and the public generally by bringing about a material change in the transportation situation, and will constitute an unnecessary burden upon interstate commerce, directly and adversely affecting the welfare of plaintiffs and the public interest." '

"It is not alleged that the respondent has ever served the produce market in Kansas City, Missouri, or that petitioners make or receive shipments over its lines or that the proposed extension will deprive them of any shipping facilities. Evidently the real purpose was to obstruct construction of a competitor and the theory upon which the proceeding rests would permit petitioners to sue if any railroad should extend its lines to any market competing with the market at Kansas City, Missouri.

"Concerning the purport of the allegations of the bill, the Circuit Court of Appeals rightly said: 'It is obvious that the only basis for the plaintiffs' claim that the alleged extension of the lines of the defendant to the Kansas City, Kansas, market will particularly injure them is that they do business upon the Kansas City, Missouri, market, and

that if the proposed rival market in Kansas City, Kansas, functions, it will divert business from the market upon which they operate and will thus hurt them, their business and their investments in Kansas City, Missouri, and that, since the proposed extension of its tracks by the defendant is necessary to enable the rival market to function such extension will therefore injure the plaintiffs. It seems equally obvious that, except for the fact that the proposed extension is essential to the operation of the rival market in Kansas, it could not possibly have any direct or immediate effect upon the plaintiffs, their property or their business in Missouri, other than the effect which a wasteful expenditure by the defendant of its money would have upon the public generally. The proximate cause of the injury to the plaintiffs will be the competition created by the construction and operation of the rival market, and not the construction or operation of the transportation facilities furnished to it by the defendant or by others engaged in the transportation business.'

"It declared that the question whether petitioners were 'parties in interest' within Paragraph 20 must be determined upon consideration of *Western Pacific California R. Co.* v. *Southern Pacific*, 284 U. S. 47, 52 S. Ct. 56, 76 L. Ed. 160, and concluded—'The plaintiffs have no definite legal right which is threatened. They are, however, persons whose welfare may be adversely affected by the bringing about of a material change in the transportation situation, in the sense that the extension proposed by the defendant, if built and operated, will enable a competitive market to function to their detriment. In that sense, we think it may safely be said that the proposed extension of defendant's lines may adversely affect the plaintiff's welfare. We are of the opinion, however, that their complaint discloses that their welfare cannot be directly, but only indirectly and consequentially, affected by the proposed extension. They are not in competition with the defendant. They are not engaged in the transportation business. Their only peculiar interest in that business is in the effect which

changes in it may have upon the market where they do business and upon rival markets now or hereafter established in the territory which the plaintiffs serve. * * * We conclude that the statute is not to be so liberally construed as to enable those who fear adverse effects upon their business from the establishment of competitive enterprises requiring transportation facilities, to maintain suits to enjoin railroads from constructing what are claimed to be unauthorized extensions to serve such enterprises.'

"A dissenting opinion by Judge Stone likewise relied upon *Western Pacific California Railroad Co.* v. *Southern Pacific Company,* but took the view that the challenged action might directly and substantially affect petitioners' welfare since their financial interests would suffer from the proposed rival market which could not come into existence without the proposed extension.

"The purpose and effect of paragraphs 18, 20 and 21 were much considered in *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.,* 270 U. S. 266, 46 S. Ct. 263, 70 L. Ed. 578, and *Western Pacific California Railroad Co.* v. *Southern Pacific Company,* 284 U. S. 47, 52 S. Ct. 56, 76 L. Ed. 160.

"In the first of these causes a railroad sought to prevent another from building an extension. The meaning of the term 'party in interest' was not discussed. But the opinion asserts that by the Transportation Act of 1920, 'Congress undertook to develop and maintain, for the people of the United States; an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers, is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources, and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public, as well as in benefit; and that, when a railroad inflicts injury upon its rival, it may be the pub-

lic which ultimately bears the loss.' (270 U. S. 266, 46 S. Ct. 266, 70 L. Ed. 578.)

"Also 'the prohibition of paragraph 18 is absolute. If the proposed track is an extension, and no certificate has been obtained, the party in interest opposing construction is entitled as of right to an injunction.'

"In the second cause (284 U. S. 47, 52 S. Ct. 57, 76 L. Ed. 160), it was claimed that the Western Pacific was not a 'party in interest' within the statute. The Circuit Court of Appeals, 9 Cir., 46 F. (2d) 729, accepted that view; we concluded otherwise but did not undertake to announce an inclusive and exclusive definition of the term. The circumstances disclosed a special interest in that complainant with probability of direct loss from what the defendant—not another—proposed to do. The portion of the opinion, presently specially important, follows—'If, as the court below seems to have assumed, a "party in interest" must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the Congressional plan for promoting transportation. On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complaint must possess something more than a common concern for obedience to law. See *Massachusetts* v. *Mellon*, 262 U. S. 447, 488, 43 S. Ct. 597 (601), 67 L. Ed. 1078). It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened, or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation.'

"The Transportation Act, 1920, was designed to protect the public against action which might endanger its interest. In order to aid that general purpose, Paragraph 20, Section 402, provides that suit for an injunction may be instituted by the United States, the Commission (I. C. C.), any Commission or Regulative Body of the state or states

affected, or any 'party in interest'. Such a suit cannot be instituted by an individual unless he 'possesses something more than a common concern for obedience to law'. The general or common interest finds protection in the permission to sue granted to public authorities. An individual may have some special and peculiar interest which may be directly and materially affected by alleged unlawful action. See *Detroit & M. Ry.* v. *Boyne City, etc., Co.*, D. C. 286 F. 540. If such circumstances are shown he may sue; he is then 'party in interest' within the meaning of the statute. In the absence of these circumstances he is not such a party.

"We cannot think Congress supposed that the development and maintenance of an adequate railway system would be aided by permitting any person engaged in business within or adjacent to a public market to demand an injunction against a carrier seeking only to serve a competing market by means of an extension not authorized by the Interstate Commerce Commission.

"The right to sue under the statute is individual. Petitioners are not helped by uniting.

"The Circuit Court of Appeals after reviewing all the facts reached the conclusion that the welfare of petitioners could only be indirectly and consequentially affected by the proposed extension; that their interest in the transportation situation 'is in the effect which changes in it may have upon the market where they do business and upon rival markets now or hereafter established in the territory which the plaintiffs serve'. It held this was not enough. We agree. A mere extension to the plan of a competitor which in no other way affects the complaining parties in no proper sense brings about a material change in the transportation system directly affecting their peculiar interest which they have the right to prevent by suit.

"The challenged judgment must be affirmed.

"Affirmed."

*Detroit & M. Ry. Co.* v. *Boyne City, etc., Co., 286 Fed. 540.*

"TUTTLE, District Judge. These two causes involve the same material questions of fact and of law and have been tried together on final hearing upon the pleadings and proofs. The bills, which are substantially identical except that each is filed by a different plaintiff, pray the same relief, namely, an injunction restraining the defendant railroad company from constructing or operating certain new tracks, which defendant proposes to construct and use, without first obtaining from the Interstate Commerce Commission a certificate of public necessity and convenience. Whether such a certificate is required for the construction of such tracks is the ultimate question presented.

"The determination of the question just stated requires a consideration of the construction and effect of paragraphs 18, 19, 20 and 22 of section 1 of the Interstate Commerce Act (being the Act of February 4, 1887, c. 104, 24 Statutes at Large, 379, entitled, 'An Act to regular commerce,' as amended), which paragraphs were added to said section 1 by section 402 of the so-called Transportation Act (the Act of February 28, 1920, c. 91, 41 Statutes at Large, 456, 477).

"The paragraphs referred to provide as follows:

* * * (The Court quoted sections 18, 19, 20 and 22 of Title 49, U. S. C. A., which are not here set out for the purpose of brevity.)

"After careful study of the language of the statute quoted, I am satisfied that under the correct construction of the last preceding paragraph, the final restrictive clause thereof qualifies and refers to the words 'electric railways' and not the words 'side tracks,' and that the rights of the parties hereto depend upon the question whether, on the one hand, the proposed construction of these new tracks by the defendant would constitute 'the construction * * * of spur, industrial, team, switching or side tracks,' or whether, on

the other hand, such construction by defendant would be 'the extension of its line of railroad, or the construction of a new line of railroad,' within the meaning of these three subdivisions of the section of the Interstate Commerce Act here involved. The tracks mentioned are proposed to be located wholly within the state of Michigan. No certificate has been obtained from the Interstate Commerce Commission. If, then, such track will be a spur track, defendant is entitled to proceed with its construction without a certificate from the Interstate Commerce Commission. If, however, such track is an 'extension' or 'a new line' of railroad, plaintiff is entitled to the injunction sought.

"The parties entered into the following stipulation, which has been filed in the case:

'All statements of fact contained in the bill of complaint herein which are admitted by the answer herein are true.

'The railroad contemplated to be built by defendant affected by this proceeding, and running from the shale bed of the Huron Portland Cement Company to the main line of defendant, is 3 3/4 miles long.

'Defendant is engaged in interstate commerce, and the said track 3 3/4 miles long running from the Huron Portland Cement Company shale beds to the main line of defendant will be used and is to be constructed and is to be operated as part of defendant's general steam railroad system of transportation for the transportation of freight upon and across it and defendant's main and other railroad.

'The location of said proposed line of 3 3/4 miles from said Huron Portland Cement Company's shale beds to the main line of defendant, the location of the main line of the defendant in Alpena county and the location of the Hillman branch of the Detroit & Mackinac Railroad with its agency and non-agency stations thereon, in Alpena County, is correctly shown by Exhibit A attached to the bill of complaint of plaintiff herein and by the map of Alpena county

to be used and made a part of the evidence at the hearing.

'Whether said line proposed to be constructed by defendant running 3 3/4 miles in length from the Huron Portland Cement Company's shale beds to the main line of defendant constitutes an extension or addition of defendant's line of road or a new line of railroad or a railroad line within the meaning of section 1, par. 18 of the Interstate Commerce Act, or whether said railroad is a spur, and if a spur whether such a spur as to be within the meaning of section 1, par. 22 of said act, requiring an Interstate Commerce Commission certificate, is a disputed question and not stipulated by the parties hereto.

'Except as hereinbefore stated and agreed upon, wherever the facts are disputed the court shall determine the facts, and in such determination the court may consider that plaintiff's proofs sustain plaintiff's allegations on said disputed facts and defendant's proofs sustain defendant's allegations on said disputed facts, except as modified by the exhibits read into the record, including admissions of defendant respecting the new line of railroad complained of and other exhibits used and admitted on the hearing. When determined by the court, said determination of said disputed facts shall be considered and treated as the true facts for the purposes of this litigation.'

"The material facts, as found by me from the record before the Court, are as follows:

"All of the parties are residents and citizens of Michigan and of this district, and the jurisdiction of this court is properly invoked under, and based upon, subdivision 8 of section 24 of the Judicial Code (Comp. St. §991) conferring on the District Court jurisdiction of 'all suits and proceedings arising under any law regulating commerce'; these companion bills being filed pursuant to the express provisions of paragraph 20 of section 1 of the Interstate Commerce Act, already cited and quoted. The Boyne City,

Gaylord & Alpena Railroad Company (hereinafter termed the defendant railroad) has for about 12 years last past maintained and operated, as it now does, a common carrier railroad from Alpena, Mich., on Lake Huron, where such railroad has good water connections, westerly across the state of Michigan about 92 miles to Boyne City, Mich., on Lake Michigan, where said railroad also has advantageous water connections. It is engaged in interstate as well as intrastate commerce, and is subject to the Interstate Commerce Act. About 5 miles west of Alpena its main line of railroad, which at that point runs in a general northeasterly to southwesterly direction, intersects the so-called Hillman Branch line of the Detroit & Mackinac Railway Company (hereinafter termed the plaintiff railroad), which branch line of the plaintiff railroad extends westerly from Alpena to the town of Hillman, about 24 miles west of Alpena, and there ends. East of the said point of intersection of the aforesaid lines, both railroads run in a general easterly and northeasterly direction, for about 5 miles, as just stated, to Alpena. West of said intersection, the plaintiff railroad runs westerly to Hillman; while the defendant railroad runs, from such point of intersection, first southwesterly and then westerly, parallel to, and just south of, plaintiff railroad, being about 6 miles south of Hillman while passing to the south of it toward Boyne City, its already mentioned western terminus. From the point of intersection just referred to, the plaintiff railroad runs west, about 19 miles to Hillman, stopping at a number of towns and stations along the route and serving several communities and industries along the way. Among the latter are certain shale deposits and a quarry, located 3 3/4 miles west of the aforesaid railroad intersection, which shale quarry and beds are owned by the Huron Portland Cement Company (which operates a cement-making plant in Alpena, about 10 miles east and north of said quarry), and are located about a fourth of a mile north of said plaintiff's Hillman branch, and, by means of side tracks, are reached and served by such branch; there being a station

thereon at this point called Paxton. The trackage involved in this controversy consists of a track which the defendant railroad proposes, and has commenced, to construct westward from a point on its main line located about 80 rods north of the aforesaid intersection, to run for about 3 3/4 miles in a westerly direction parallel to, and about a quarter of a mile north of, the aforementioned line of the said Hillman branch of plaintiff railroad, to the shale beds and quarry just mentioned. Said track will bridge a river about 100 feet wide and will cost about $75,000. Said proposed track will cross land owned by the plaintiff Charles R. Henry.

"Prior to the undertaking of the construction of this new trackage, the defendant railroad and the said cement company entered into certain traffic contracts providing for the operation by said cement company of trains from its said shale beds and quarry over said trackage to the main line of the defendant railroad, and thence over such main line to its manufacturing plant previously mentioned, a total distance of about 10 miles. The record shows, and I find, that such trains, complete including engine, will be made up and loaded on sidings and switches (connected with and incident to said proposed trackage) at the quarry in question and hauled, as trains of the defendant, in continuous and through transportation over the proposed track to the main line of the defendant and thence over said main line to the cement factory mentioned, in Alpena. The rates to be paid by the cement company for such transportation will be, in substance and essence, in the nature of line haul rates, being based upon the continuous trip as a whole and not involving switching service or charges. These full trains will be operated at frequent intervals. On the proposed route of this new track the defendant has a gravel pit from which, if such track be constructed, it will haul thereover considerable quantities of gravel; the loading being done by the aid of sidings to be located at said pit and used in connection with the proposed track. In addition to this shale and gravel, a certain quantity of farm and forest

products will be carried from the territory through which said track will run, for the public residing or doing business there. Such of this last-mentioned freight as may be consigned to Alpena and points beyond will undoubtedly, as already stated, in part at least be carried easterly and northeasterly in continuous movement over the proposed track to and over the main line of the defendant, without the performance of any switching service by the latter or the payment of any switching charge. West and northwest of the shale quarry mentioned are shale deposits and a farming district extending for a considerable distance and it is clear that it would be only a question of time, if the track now proposed should be constructed, before a further extension of such track to the west or northwest of its present proposed terminus would be desired or required. Under the laws of Michigan (sections 8121 and 8122, Michigan Compiled Laws of 1915) the track sought to be constructed would be a public track subject to the control of the State Public Utilities Commission with respect to the kind and extent of train and transportation service to be furnished to the public. It is conceded in one of the characteristically able briefs of counsel for defendant that—

'The Commission may require that regular train service be given over a track built and originally operated as a spur, where transportation needs are such as to make a regular train service necessary for its reasonable accommodation.'

"I am satisfied from the evidence, and I find, that said track will, if constructed, be used in interstate as well as intrastate commerce. I further find that if so constructed said track will necessarily create, and be used in, competition between the plaintiff and defendant railroads as parallel and competing lines, to the consequent injury of both of said railroads and of the public.

"In view of the foregoing facts as found by me to exist, the question to be determined is whether the trackage

sought to be constructed by the defendant will, if constructed, constitute, on the one hand, an extension of the defendant's present line of railroad, or a new branch line, or whether on the other hand, it will be a spur, industrial, team, switching, or side track within the meaning of paragraph 22 of section 1 of the Interstate Commerce Act.

"It is a cardinal principle of statutory construction that in interpreting the language of a statute the meaning of the words used must, if not so plainly expressed as to leave no room for doubt, be determined by a consideration not only of such words but also of the purpose with which they were used by the legislative body enacting such statute, and, consequently, of the object thereby sought to be accomplished.

"It is certain that the purpose actuating Congress in adding to the Interstate Commerce Act the provisions here involved was, as was pointed out by Interstate Commerce Commissioner Clark while speaking before the Committee on Interstate and Foreign Commerce of the House of Representatives, when such committee was considering the enactment of these amendatory provisions, and shortly before such enactment, 'to prevent the building of duplicate lines of railroad because of keen rivalry of certain financial interests, or when the railroads so built will not serve the present or future convenience and necessity, and will simply depend for traffic upon that which they can get away from railroads already built, adding to the total burden of maintenance, capital returns, etc., which the public must pay.'

"Congress had in mind and was endeavoring to correct the disastrous evils, to both the railroads and the public, which for many years had attended the construction of lines of railroad, main and branch, in ruinous competition with each other and with resultant injury to the public which was compelled to bear the inevitable consequences of such a situation. The statutory provisions now under consideration substituted, as the underlying basis for the construction of new lines of railroad (main and branch), in place of the previously controlling policy of the private

desires and ambitions of owners of railroads, the new test and rule of public convenience and necessity. The specific mischief, however, which, in this particular instance, it was sought to guard against, was the construction of such new lines of railroad, not the construction of merely incidental tracks such as those excepted by paragraph 22 of section 1, from the provisions of the statute. In view of the relatively small expense of these last-mentioned tracks and the inherent improbability of such construction unless actually needed in connection with main or branch lines, it was evidently deemed by Congress unnecessary, if not unwise, to require a public hearing, with the consequent procedural formality, and conditions necessarily incident thereto, whenever it should be desired to lay one of these auxiliary tracks so commonly used and needed through the country.

"While perhaps the essential characteristics and elements of such tracks might well have been described and the meaning of the language used more clearly defined, yet it is sufficiently plain, from a consideration of not only the obvious purpose prompting the statute but also of the general nature of the tracks mentioned, that Congress intended to subject to the requirements of the act so-called main or branch lines of railroad, that is, lines designed and used for continuous transportation service by through, full trains between different points of shipment or travel, and to exclude from the operation of the statute all that mass of 'tracks' (as distinguished from 'lines') naturally and necessarily designed and used for loading, unloading, switching, and other purposes connected with, and incidental to, but not actually and directly used for, such transportation service. The Century Dictionary defines the word 'spur track' as a 'short track leading from a line of railway and connected with it at one end only.' Webster's New International Dictionary uses the term as synonymous with 'stub track.' It is, however, a matter of common knowledge that the term 'spur track' is used to indicate one of the class of incidental tracks just mentioned. Neither the Interstate

Commerce Commission nor any court has, so far as this court has been able to discover, attempted to frame a definition of the term within the meaning of the statute here involved, nor considered the precise question here involved. The Commission has, in one of its recent cases, expressed the opinion that—

'The line of demarkation between a spur track and a branch line of railroad is often somewhat vague and difficult of ascertainment, but we think that each case must be governed by its own facts.'

"It is urgently insisted by defendant that the distinguishing feature of a spur track is the absence of stations and regular train service thereon, and the classification of such tracks as spur tracks by the Interstate Commerce Commission in connection with its accounting practice is referred to in support of such contention. It must be borne in mind that the practice of the Commission referred to has no relation to the use or definition of the term within the meaning of this particular statute, as is indicated by the opinion of the Commission just quoted. Assuming, however (contrary to the conclusion of this court), that stations and regular train service were necessary elements of a branch line, and that their absence conclusively indicated a spur, and that they were not merely usual circumstances commonly connected therewith, this argument cannot, in my opinion, be applied to the present case. The track in question is not new in existence, but the record here shows conditions which I find would justify the proper public officials in requiring at least one station on, and regular train service over, the proposed new line.

"I will not at this time attempt to state a definition of the term 'spur track' which will necessarily be exact and complete in all cases, but in my opinion the distinguishing feature between 'extensions' and 'new lines' on the one hand, and 'spur, industrial, team, switching or side tracks,' on the other, as used in this statute, is this: That the for-

mer are tracks over which there are to be train movements in the sense that such movements are a part of the actual transportation haul from the shipper to the consignee, while the latter named tracks are for use in loading, reloading, storing, and switching the cars and other things merely incidental to the regular train haul. This track seems to be for the regular train haul in transportation proper rather than those incidental services characteristic of the tracks named as being excepted from the requirements of the act. Considering all of the facts and circumstances of the present case, including the proposed operation of the entire trains over the proposed track and the main line of defendant in continuous transportation and without switching movements or charges; considering the sidings and public loading stations to be constructed and used in connection with said track; considering the expense of the proposed undertaking; considering the competitive character and results of the contemplated use and operation of said track and trains; considering the fact that the proposed track and train service will be between points where the competing railroad now maintains stations and between which the competing railroad now operates a regular train service; and in view of the entire record—I reach the conclusion that such proposed track has the characteristics of, and constitutes, not a 'spur track,' but a new 'line' more specifically, an extension or a branch line. *Akers* v. *United N. J. R. Canal Co.*, 43 N. J. Law 110; *Illinois Central R. R. Co.* v. *Sioux Falls Quarry Co.*, 33 S. D. 63, 144 N. W. 724; *Memphis* v. *St. Louis & San Francisco R. R. Co.*, 183 Fed. 529, 106 C. C. A. 75 (C. C. A. 6).

"As the present line of defendant railroad is engaged in interstate commerce, and as this proposed extension, or branch would, when completed, become a part of such interstate commerce railroad, said branch would thereby itself become a part of interstate commerce. For that reason, as well as because, even if it were entirely intrastate in character, its "unremunerative operation would or might burden or cripple the main line (of the defendant railroad)

and thereby affect its utility for service as an artery of interstate and foreign commerce' (*State of Texas* v. *Eastern Texas Railroad Co.*, 258 U. S. 204, 42 Sup. St. 281, 66 L. Ed. ....), I cannot doubt that Congress constitutionally could, and under the statutory provisions hereinbefore considered did, make the construction of such track subject to the orders of the Interstate Commerce Commission and dependent upon the issuance of that body of the certificate prescribed in paragraph 18 of section 1 of the Interstate Commerce Act.

"I am of the opinion that the plaintiff in each of these suits is 'a party in interest' within the meaning of paragraph 20 of said section, and as such entitled to the relief prayed and that a decree should be entered restraining the defendant, its agents, attorneys, officers, and employees, and each of them, from undertaking the construction of the proposed extension of its line of railroad, that is, the branch line consisting of the proposed trackage mentioned and referred to in the bills of complaint herein, unless and until there shall first have been obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require, or will require, the construction of said extended and additional branch line of railroad, pursuant to the applicable paragraphs of section 1 of the Interstate Commerce Act hereinbefore cited.

"A decree will be entered accordingly."

*Lucking* v. *Detroit & Cleveland Nav. Co., 265 U. S. 346.*

"Mr. Justice BUTLER delivered the opinion of the Court.

"March 25, 1921, appellant filed his complaint in the District Court for the Eastern District of Michigan, praying a mandatory injunction to compel appellee to operate its steamboats, Alpena II and Mackinac II, on the Detroit

and Mackinac route in the navigation season of that year, as it had done in prior years.

"Appellee is a corporation organized under the laws of Michigan, and has long been a common carrier of passengers and freight for hire on steamboats operated by it between Detroit, Mich., and Cleveland, Ohio, between Detroit and Buffalo, N. Y., and between Detroit and Mackinac Island, Mich. For many years, by arrangement with carriers by rail, it had carried some passengers and freight under joint lake and rail tariffs providing for continuous carriage, partly by railroad and partly by water, to and from various ports reached by its steamers, and to and from points on lines of carriers by railroad. Appellee proposed to discontinue service on the route between Detroit and Mackinac Island. The complaint alleged that appellant had been in the past, and that he desired to become, in the season of 1921 and thereafter, a passenger and a shipper of freight on appellee's steamers on the Detroit and Mackinac route. It further alleged that it was appellee's duty to provide and furnish transportation for passengers and property during that season and thereafter over the route above named, and that to abandon such service would violate the Act to Regulate Commerce, as amended (Comp. St. Ann. Supp. 1923, §8563), and particularly sub-divisions (1) (a), (3) and (4) of section 1. Appellee moved to dismiss the complaint on the ground that the court was without jurisdiction, and that appellant was not entitled to the relief prayed. The District Court held that the suit involved a federal question and was within its jurisdiction, and, on the merits, decided that appellant was not entitled to relief and dismissed the complaint. 273 Fed. 577. The Circuit Court of Appeals affirmed the decree. 284 Fed. 497. The case is here on appeal under section 241 of the Judicial Code (Comp. St. §1218).

"On the allegations of the complaint, the suit is one arising under the laws of the United States, and particularly the Act to Regulate Commerce. Its decision involves the construction and application of certain provisions of

that act. It was rightly held in the courts below that the District Court had jurisdiction. *Louisville & Nashville R. Co.* v. *Rice,* 247 U. S. 201, 203, 38 Supp. Ct. 429, 62 L. Ed. 1071; *Greene* v. *Louisville & Interurban Railroad Co.,* 244 U. S. 499, 506, 508, 37 S. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88.

"There remains the question whether appellee was bound to resume and maintain the service.

"The obligation was not imposed by appellee's charter or the statutes of Michigan. The company was organized under the Commerce and Navigation Act of 1867 (chapter 181, Compiled Laws 1897). By compliance with the provisions of that act, persons were authorized to become a body corporate 'for the purpose of engaging in the business of maritime commerce or navigation within this state, or upon the frontier lakes or other navigable waters, natural or artificial, connected therewith. * * * ' Section 2. The General Corporation Act of Michigan of 1903 (Compiled Laws 1915, c. 175), superseded the act of 1867, but contained a saving clause as to rights which had been secured under the earlier act. The act under which appellee was organized does not prescribe or require the articles to specify any route over which such a corporation is to operate its boats, and does not require it to continue in business. Appellee's articles of association adopted the statutory language, and do not designate any route for the operation of its boats, or require it to continue operation. Appellee has no power of eminent domain or special privilege or right in respect of the business it is authorized to do, which a natural person owning a vessel and engaged in the same business does not have. It is under no contractual obligation to operate on the route in question. Act No. 56, Public Acts 1919, provides that no person, firm or corporation owning or operating any railroad shall abandon its main line or track or any portion thereof without the permission of the state commission. There is no similar statute relating to carriers by water.

"The obligation to continue is not imposed by any principle of the common law. Reasonableness of service on a route over which appellee operates boats is not involved. The duty to furnish reasonable service while engaged in business as a common carrier is to be distinguished from the obligation to continue in business. No case has been cited by counsel, and we know of none, in which it has been held that there is any common law duty on a common carrier by water not to cease to operate its boats.

"The obligation to continue service is not imposed by any federal statute. Appellant relies on section 1, subd. (1) (a), of the Interstate Commerce Act (as amended by section 400, Transportation Act 1920 (Comp. St. Ann. Supp. 1923, §8563) which provides that the act shall apply to common carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management, or arrangement for continuous carriage or shipment, and a provision in subdivision (3) defining 'carrier' to mean 'common carrier', and 'transportation' to include locomotives, cars and other vehicles, vessels, and all instrumentalities of shipment or carriage, and a provision of subdivision (4) making it the duty of every common carrier, subject to the act, engaged in the transportation of passenger or property, to provide and furnish such transportation upon reasonable request therefor.

"But in connection with these provisions, there should be read subdivision (18) of the same section, which provides that no carrier by railroad subject to this act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit such abandonment.

"Carriers by water, such as appellee, are within the terms of the Transportation Act for certain purposes; e. g., for the regulation of their accounts, the making of reports,

the prevention of rebates, discrimination, and the like. Certain provisions of the act are applicable to some carriers and not to others. *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 208, 32 Sup. Ct. 436, 56 L. Ed. 729. The imposition of a duty upon a carrier by water to furnish transportation upon reasonable request does not create an obligation to continue to operate boats on a particular route. The provision of subdivision (18) above referred to is specifically limited to lines of railroad. This indicates legislative intention that carriers by water are not required to continue and may cease to operate if they see fit.

"No duty to continue to operate its boats on the Detroit and Mackinac Island route is imposed on appellee by its charter, the statutes of Michigan, the common law or federal statutes.

"Decree affirmed."

JUL 27 19
CHARLES ELMORE

In the

# Supreme Court of the United States

October Term, 1951

No. 149

LUTHER E. JOHNSON AND L. RAY TEMPLE,
*Petitioners*

v.

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY,
*Respondent*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF FOR RESPONDENT IN OPPOSITION

LEIGH D. WILLIAMS,
Citizens Bank Building,
Norfolk, Virginia,

HORACE L. WALKER,
HEWITT BIAETT,
1500 First National Bank Building,
Richmond 10, Virginia,

*Counsel for Respondent.*

July 26, 1951

## INDEX


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 1 |
| Question Presented | 2 |
| Statute Involved | 2 |
| Statement of the Case | 2 |
| Argument | 5 |
| A. Petitioners' Only Basis for Jurisdiction is as Parties in Interest Under Section 1(20) of the Interstate Commerce Act | 5 |
| B. Petitioners Did Not Testify at the Trial and Did Not Prove Essential Jurisdictional Facts | 8 |
| C. The Court of Appeals' Judgment is Sustained by a Consistent Line of Decisions of this Court | 10 |
| Conclusion | 18 |

## Table of Cases Cited


| | Page |
|---|---|
| Boston Tow Boat Co. v. U. S., 321 U. S. 632 | 17 |
| Detroit & M. Ry. Co. v. Boyne City, G. & A. R. Co., 286 F. 540 | 15 |
| Edward Hines Trustees v. U. S., 263 U. S. 143, 148 | 17 |
| Farmers Grain Co. v. Toledo, P. & W. R. R., 158 F. (2d) 109 (C.C.A.-7, 1946) | 16 |
| Home Furn. Co. v. United States, 271 U. S. 456 | 17 |
| Johnson, et al. v. Chesapeake & O. Ry. Co., 188 F. (2d) 458 | 5 |
| KVOS, Inc. v. Associated Press, 299 U. S. 269, 280 | 8 |
| Lucking v. Detroit Nav. Co., 265 U. S. 346 | 7 |
| McNutt v. General Motors &c. Corp., 298 U. S. 178, 189 | 8 |
| Moffat Tunnel League v. U. S., 289 U. S. 113 | 17 |
| Pittsburgh & W. Va. Ry. v. U. S. 281 U. S. 479 | 16 |
| R. R. Comm. v. Southern Pac. Co., 264 U. S. 331 | 10 |
| Singer & Sons v. Union Pacific R. Co., 311 U. S. 295 | 10, 12, 14 |
| Sprunt & Son v. United States, 281 U. S. 249, 254 | 17 |
| Texas & Pac. Ry. v. Gulf, etc., Ry., 270 U. S. 266 | 6, 7, 10 |
| Western Pacific v. South. Pac. Co., 284 U. S. 47 | 6, 10, 11 |
| Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co., 257 U. S. 563 | 10 |


## Statutory Provisions Cited


| | |
|---|---|
| 28 U. S. C. A. § 1254(1) | 1 |
| 28 U. S. C. A. § 1331 | 6, 7 |
| 28 U. S. C. A. § 1337 | 6, 7 |
| 28 U. S. C. A. §§ 2321-2325 | 16 |
| 49 U. S. C. A. § 1(18) | 2 |
| 49 U. S. C. A. § 1(20) | 2 |

In the

# Supreme Court of the United States

October Term, 1951

No. 149

LUTHER E. JOHNSON AND L. RAY TEMPLE,
*Petitioners*

v.

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY,
*Respondent*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF FOR RESPONDENT IN OPPOSITION

## OPINIONS BELOW

The opinion of the District Court of the United States for the Eastern District of Virginia (R. 31-2) is unreported. The opinion of the Court of Appeals for the Fourth Circuit (R. 102-3) is reported in 188 F. (2d) 458.

## JURISDICTION

The judgment of the Court of Appeals was entered on April 10, 1951 (R. 104). The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

## QUESTION PRESENTED

Whether petitioners alleged and proved facts necessary to sustain the jurisdiction of the District Court and to give such petititoners the requisite standing to maintain a suit as parties in interest under the provisions of 49 U.S.C.A. § 1(20), seeking an injunction restraining respondent, pursuant to authority granted by the State Corporation Commission of Virginia from abandoning the operation of a passenger ferryboat between Newport News and Norfolk and Portsmouth, Virginia, without having first obtained authority from the Interstate Commerce Commission under the provisions of 49 U.S.C.A. § 1(18), where respondent has continued to operate freight ferryboats and to provide passenger service by motorbus between said points.

## STATUTE INVOLVED

The pertinent statutory provisions involved are set forth in the Petition at pp. 11-13.

## STATEMENT OF THE CASE

In the United States District Court for the Eastern District of Virginia, the petitioners herein sued for an injunction under Section 1(20) of the Interstate Commerce Act, restraining this respondent from suspending, pursuant to authority granted by the State Corporation Commission of Virginia, the operation of a passenger ferryboat between its rail terminus at Newport News, Virginia, on the one hand, and its termini at Norfolk and Portsmouth, Virginia, on the other hand, without first obtaining a certificate of public convenience and necessity from the Interstate Commerce Commission authorizing the abandonment of a line of railroad, or the operation thereof, under the provisions of Section 1(18) of the Interstate Commerce Act. 49 U.S.-

CA. §§ 1(18), 1(20). Respondent denied that the suspension of the operation of passenger ferryboats between said points resulted in the abandonment of all or any portion of its line of railroad, or the operation thereof, within the purview of Section 1(18) of the Interstate Commerce Act, and further averred that respondent would continue to operate freight ferryboats and to provide passenger service by motorbus between said points.

In the pleading captioned Motion for Preliminary Injunction, later changed to Complaint filed June 1, 1950, commencing this litigation, paragraphs 7 and 8 thereof (R. 3-4) comprised the only allegations relating to the petitioners' interest or standing to maintain this suit.

It was there alleged that Luther E. Johnson, an employee of some three years' service and a member of the crew of the Steamer "Virginia" used in the passenger ferryboat service, had acquired seniority rights and retirement benefits while so employed and that if the service by passenger ferryboats were to be discontinued he would be deprived of his job as a member of the crew of the Steamer "Virginia" and thereby suffer damage in excess of Three Thousand Dollars. L. Ray Temple, a resident of Virginia, and an alleged user of the railway facilities, merely represented that he would be irreparably harmed if the passenger ferryboat were discontinued and passenger service provided by motorbus.

Respondent's answer, paragraph 7 (R. 11-12) denied that petitioner, Luther E. Johnson, had acquired valuable seniority and retirement rights; that this petitioner would be deprived of any lawful rights, and that respondent proposed to abandon all or any portion of its line of railroad. Respondent further answered that this petitioner would retain all seniority and retirement rights he then possessed and would be employed as a marine engineer on respondent's Newport News and Norfolk Terminal Division to such an

extent as his seniority rights in relation to other marine engineers on that division would permit. Respondent's answer alleged that it had no knowledge of the residence of petitioner, L. Ray Temple, or his alleged use of respondent's railroad facilities and called for strict proof of such allegation. Respondent also denied that the operation of transfer service by motorbus in lieu of a passenger ferryboat would result in irreparable harm to this petitioner or deprive him of any rights which he lawfully possessed.

Although the complaint alleged that petitioner, Luther E. Johnson, would be deprived of valuable earnings and rights, and that petitioner, L. Ray Temple, would be irreparably harmed and deprived of beneficial transportation facilities, nevertheless, respondent denied each and every allegation. Neither petitioner, Luther E. Johnson, nor petititoner, L. Ray Temple, testified at the trial of this action or attempted to supply the jurisdictional facts required for the maintenance of this action. Hence, petitioners' unsupported allegations, which were denied by respondent, present the only matters before the Court upon which it can be claimed that such petitioners are parties in interest within the meaning of the statute.

The District Court heard petitioners' Motion for Preliminary Injunction on the pleadings as submitted and concluded that neither in fact nor in law had there been an adandonment of a line of railroad. On final hearing, after hearing testimony and argument in open court, the District Court denied the injunction and ordered that the action be dismissed.

Petitioners appealed the decision of the District Court to the Court of Appeals for the Fourth Circuit. The Court of Appeals, after briefs had been submitted by both parties and a hearing had on the merits, vacated the judgment of the District Court and directed that the case be remanded to the

District Court with directions to that Court to dismiss the complaint because the petitioners were not parties in interest with proper standing to maintain the action. *Johnson, et al.* v. *Chesapeake & O. Ry. Co.*, 188 F. (2d) 458.

Petitioners repeatedly assert, pages 5, 7 and 10, that the Court of Appeals held that a District Court has no jurisdiction of any complaint of any individual for an injunction restraining a carrier from unlawfully abandoning a portion of its line of railroad, that no individual citizen can be a party in interest within the scope of Section 1(20) of the Interstate Commerce Act, and that the effect of the Court of Appeals' decision is to deprive every individual from having his day in court. As a preface to respondent's argument to follow, it is to be noted that the precise language of the Court's decision is that (petitioners) "Neither alleged or proved any such interest in the continuance of the ferry service as would give them standing in court to maintain a suit of this character."

## ARGUMENT

### A. Petitioners' Only Basis for Jurisdiction is as Parties in Interest Under Section 1(20) of the Interstate Commerce Act.

Petitioners instituted this proceeding in an effort to secure a preliminary and permanent injunction restraining respondent from an alleged abandonment of a line of railroad without having first obtained a certificate of public convenience and necessity from the Interstate Commerce Commission. Specifically, petitioners sought to enjoin the discontinuance by respondent of the operation of a passenger ferryboat between points within the State of Virginia between which respondent operated both passenger and freight ferryboats via the same route and in the same channel. Respondent has

continued the operation of freight ferryboats, but, pursuant to authority granted by the State Corporation Commission of Virginia, respondent has discontinued only the operation of the passenger ferryboat and is now providing passenger service between such points by motorbus. Petitioners alleged that the above action violated the provisions of Section 1(18) of the Interstate Commerce Act and that petitioners were entitled to an injunction under the provisions of Section 1(20) of that Act. By its express terms, Section 1(20) authorizes an injunction against an abandonment contrary to the provisions of Section 1(18) at the suit of the United States, the Interstate Commerce Commission, any commission or regulatory body of the State affected, or any party in interest. Since petitioners neither constitute nor represent any of the governmental bodies named by the statute, their only right to maintain a suit for an injunction under Section 1(20) necessarily must rest upon allegation and proof that petitioners are parties in interest within the intendment of that statute.

In addition to the specific allegations relating to Sections 1(18) and 1(20) of the Interstate Commerce Act, petitioners attempted to invoke the jurisdiction of the District Court under the general provisions of 28 U.S.C.A. §1331 and 28 U.S.C.A. §1337. However, it seems patent that these general statutory provisions relating to jurisdiction of the district courts of civil actions arising either under the constitution, laws or treaties of the United States or any Act of Congress regulating commerce, neither supplement nor supersede the specific provisions of the Interstate Commerce Act. This point is clearly demonstrated by decisions of this court dealing with the scope, intent and purpose of the Transportation Act of 1920 in which Congress added Sections 1(18)-(22), inclusive, to the statute law of the country. *Texas & Pac. Ry.* v. *Gulf, etc., Ry.*, 270 U. S. 266; *Western*

*Pacific* v. *South. Pac. Co.,* 284 U. S. 47. In analyzing the *Texas & Pacific* case, the court stated in the Western Pacific case, at page 51:

> "The Texas & Pacific Ry. sought to prevent an unauthorized competitor from building an extension into territory already served by it. Prior to the statute, it could not have maintained such a suit, since the competitor's proposed action did not threaten interference with any legal right. No carrier could then demand exemption from honest competition."

In the absence of the statutory provisions of Sections 1(18) and 1(20), a suit could not have been maintained to enjoin either the construction or abandonment of a line of railroad on the ground that a prior certificate had not been obtained from the Interstate Commerce Commission. It necessarily follows that extraordinary relief by injunction could not be granted where either construction or abandonment of a line of railroad did not result in any interference with definite legal rights. The earlier decision of this court in *Lucking* v. *Detroit Nav. Co.,* 265 U. S. 346, referred to by petitioners, is not in conflict. There, the suit was not to enjoin an abandonment of a line of railroad contrary to the provisions of Section 1(18) of the Interstate Commerce Act. General statutory provisions, such as 28 U.S.C.A. § 1331, and 28 U.S.C.A. § 1337, admittedly confer jurisdiction upon the district courts over a great mass of matters involving federal regulation. Such provisions, however, do not confer jurisdiction independently over matters where federal rights, duties, or obligations are created and the standing necessary to enforce such rights, duties or obligations is clearly delineated in the same statute. Thus, the question of jurisdiction rests solely upon a determination of whether petitioners have shown that they are parties in interest within the meaning of Section 1(20) of the Interstate Commerce Act.

**B. Petitioners Did Not Testify at the Trial and Did Not Prove Essential Jurisdictional Facts.**

In order to maintain this action, it was incumbent upon petitioners to allege and prove the facts necessary to sustain the jurisdiction of the district court. This court has held that "If * * * allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof." *McNutt* v. *General Motors &c. Corp.*, 298 U. S. 178, 189. See also *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269, 280. Moreover, in *KVOS, Inc.* v. *Associated Press, supra*, the Court in discussing the problem of an appropriate method of challenging the jurisdictional allegation stated that "This could have been done by answer * * *." (p. 278). The instant petition merely begs the real question before the court because petitioners have neither alleged nor proved basic facts which are jurisdictional to the maintenance of this suit. The absence of necessary allegations and proof cannot be supplied by assumption, conjecture, or guesswork. An examination into the true nature of this matter clearly reveals the correctness of the decision sought to be reversed.

The complaint in this case alleged that petitioner, Luther E. Johnson, was an employe of respondent, had acquired valuable seniority rights and retirement benefits, and believed and was informed that if defendant abandoned its line of railroad he would be deprived of his job and thereby suffer a loss of earnings and other rights. Respondent's verified answer denied that this petitioner had acquired valuable seniority and retirement rights, denied that this petitioner would be deprived of any lawful rights, and further averred that this petitioner would retain any seniority and retirement rights he may possess and would continue to be employed as a marine engineer on respondent's Newport News and Nor-

folk Terminal Division to such an extent as his seniority rights in relation to other marine engineers would permit. It is significant that petitioner, Luther E. Johnson, did not appear and present evidence, nor did any other witness, relating to his alleged seniority and retirement rights or any threatened interference with such rights, although the trial was held over three months after respondent discontinued the passenger ferryboat. The reason for this somewhat unusual situation is clearly shown by the record. Although respondent discontinued the operation of a passenger ferryboat between Newport News and Norfolk and Portsmouth, Virginia, it has not discontinued the operation of freight ferryboats between those points. Thus, this petitioner's circumstance is comparable to that of an employee on a passenger train which, pursuant to state authority, is discontinued and freight trains are continued in operation on the same line of railroad. The failure of petitioner, Luther E. Johnson, to present evidence is undoubtedly accounted for by the fact that he has retained all seniority or retirement rights, as averred in respondent's answer, to employment as a marine engineer on the freight ferryboats which respondent has continued to operate between Newport News and Norfolk and Portsmouth, Virginia. Thus, the Court of Appeals held correctly that this petitioner had neither alleged nor proved the interference by respondent with any legal rights which would entitle him, as a party in interest, to maintain a suit under Section 1(20) of the Interstate Commerce Act.

The complaint in this case also alleged that petitioner, L. Ray Temple, was a user of respondent's facilities and that he would be irreparably harmed by the abandonment of a portion of respondent's line of railroad if, after such abandonment, respondent should substitute therefor bus transportion from its rail terminus at Newport News to its termini at Norfolk and Portsmouth. Respondent's answer

averred that it had no knowledge of this petitioner's use of its facilities, called for strict proof of such allegations, and denied that this petitioner would be irreparably harmed by the operation of transfer service by motorbus rather than by passenger ferryboat. Petitioner, L. Ray Temple, also failed to appear at the trial and present evidence supporting the allegations made in his behalf. It necessarily follows that the Court of Appeals held correctly that this petitioner had neither alleged nor proved either the possession of, or the interference by respondent with, any legal rights. Thus, the bare allegations of the complaint, which are not supported by any evidence of record, and which are categorically denied by respondent's answer, do not show the slightest semblance of the interest or standing required to maintain a suit for an injunction under Section 1(20) of the Interstate Commerce Act.

### C. The Court of Appeals' Judgment is Sustained by a Consistent Line of Decisions of this Court.

This Court has frequently expressed the broad concepts of national transportation policy and the overriding concern of the public welfare added to the Interstate Commerce Act by the Transportation Act of 1920. The requirement that certificates be obtained from the Interstate Commerce Commission authorizing either the construction or the abandonment is predicated solely upon the interest of the public as a whole as measured by the test of public convenience and necessity. *Singer & Sons* v. *Union Pacific R. Co.*, 311 U. S. 295; *Texas & Pac. Ry.* v. *Gulf, etc., Ry., supra; Western Pacific* v. *South. Pac. Co., supra; R. R. Comm.* v. *Southern Pac. Co.*, 264 U. S. 331, and *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563. While the statute created positive duties and obligations, nevertheless the capacity to en-

force such duties and obligations was delegated, first, to the United States, second, to the Interstate Commerce Commission, third, to affected state commissions, and, fourth, to any party in interest. Here, neither the United States nor the Interstate Commerce Commission has brought the suit. Respondent filed an application with the Interstate Commerce Commission for a certificate under Section 1(18), which application was dismissed by that Commission. The state commission is not a party to the suit. In fact, the State Corporation Commission of Virginia has authorized respondent to discontinue the passenger ferryboat operation and, in lieu thereof, to provide passenger service by motorbus. The agency designated by law to represent the people of Virginia has approved and authorized the action by respondent which is the subject of petitioners' complaint. Thus, only two individuals, who apparently did not have sufficient interest to appear and present evidence at the trial, are here claimed to be parties in interest in a matter which in both fact and law is one of public interest.

In *Western Pacific* v. *South. Pac. Co., supra,* this court considered the meaning of the term "party in interest" as used in the statute and the standing necessary to support the maintenance of a suit involving the broad considerations of public policy set out in the Transportation Act of 1920. In the course of its opinion, the court stated, on pages 51 and 52:

> "If, as the court below seems to have assumed, a 'party in interest' must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the Congressional plan for promoting transportation. On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The

> complainant must possess something more than a common concern for obedience to law. See *Massachusetts* v. *Mellon*, 262 U. S. 447, 488. It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation. Here, the petitioner was peculiarly concerned; its own welfare was seriously threatened. It alleged the beginning of the unlawful undertaking by a carrier which might prove deleterious to it as well as to the public interest in securing and maintaining proper railroad service without undue loss. It relied upon the procedure prescribed by the statute to secure an orderly hearing and a proper determination of the matter."

The expression of the Court in the above decision must be considered in the light of the fact that petitioner, a competing railroad, had filed an application with the Commission for authority to construct a line of railroad to serve the area. It alleged not only that respondent's action might prove deleterious to it, but also that such action would be harmful to the public interest in securing adequate transportation facilities without undue loss. It is apropos here that petitioners have neither alleged nor attempted to prove any element of public interest in connection with the instant complaint. As a matter of fact, petitioners, who did not even testify at the trial, have made no effort to demonstrate as much as a common concern for obedience to the law.

A particularly significant decision of this Court is that cited by the Court of Appeals. *Singer & Sons* v. *Union Pacific R. Co., supra.* The question before the Court in that case dealt with the right of certain shippers located at Kansas City, Missouri, as well as the City of Kansas City,

Missouri, to maintain a suit under Section 1(20) of the Interstate Commerce Act to enjoin a railroad from constructing certain trackage in Kansas City, Kansas, which would serve other shippers. In holding that such shippers were not parties in interest, the Court stated on pages 303-4:

> "The Transportation Act, 1920, was designed to protect the public against action which might endanger its interest. In order to aid that general purpose, Paragraph 20, § 402, provides that suit for an injunction may be instituted by the United States, the Commission (I.C.C.), any Commission or Regulative Body of the state or states affected, or any 'party in interest.' Such a suit cannot be instituted by an individual unless he 'possesses something more than a common concern for obedience to law.' The general or common interest finds protection in the permission to sue granted to public authorities. An individual may have some special and peculiar interest which may be directly and materially affected by alleged unlawful action. See *Detroit & M. R. Co.* v. *Boyne City, G. & A. R. Co.*, 286 F. 540. If such circumstances are shown he may sue; he is then 'party in interest' within the meaning of the statute. In the absence of these circumstances he is not such a party.
>
> "We cannot think Congress supposed that the development and maintenance of an adequate railway system would be aided by permitting any person engaged in business within or adjacent to a public market to demand an injunction against a carrier seeking only to serve a competing market by means of an extension not authorized by the Interstate Commerce Commission."

The leading decisions of this court clearly indicate that although competing railroads may be interested parties under the broad considerations of policy established by the

Transportation Act of 1920 governing the maintenance of an adequate railroad system, nevertheless competing shippers, who also may be affected by changes in competitive and economic situations resulting from extensions of lines of railroads without commission authority, are not parties in interest under the Act. Thus, it necessarily follows that the instant petitioners, who did not testify at the trial and who did not even attempt to prove any loss, injury, or change in the transportation situation materially affecting either such petitioners or the general public, have not shown a proper standing to litigate this matter. Essentially, the action involves a public controversy. The record is completely devoid of the elementary jurisdictional facts.

In connection with the question presented, the language of Mr. Justice Frankfurter's separate opinion in *Singer & Sons* v. *Union Pacific R. Co., supra,* illustrates the extent and importance of the public interest in cases of this character. This opinion, which was joined in by four justices who also concurred in the court's opinion, states at pages 306-8:

> "Who then is a 'party in interest'? As a part of the very system through which the national policy is to be achieved, a railroad has been deemed by this Court a 'party in interest' to effectuate the railroad policy introduced by the licensing system of the Transportation Act. *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.,* 270 U. S. 266, 277; *Western Pacific R. Co.* v. *Southern Pacific Co.,* 284 U. S. 47. And one who in a proceeding initiated before the Interstate Commerce Commission has been treated by it as a party to the litigation, cf. Los Angeles Passenger Terminal Cases, 100 I.C.C. 421; 142 I.C.C. 489; *Atchison, T. & S. F. Ry. Co.* v. *Railroad Commission,* 283 U. S. 380, 393-94, may perhaps be deemed a 'party in interest' in the further pursuit of claims before a court after adverse action by the Commission. Compare *Interstate Com-*

*merce Comm'n* v. *Oregon-Washington R. Co.*, 288 U. S. 14, and *Federal Communication Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470. But to allow any private interest to thresh out the complicated questions that arise out of § 1(18-22)—as, for instance, whether a proposed construction is an 'extension' or a 'spur', compare *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266—is to invite dislocation of the scheme which Congress has devised for the expert conduct of the litigation of such issues. It also would put upon the district courts the task of drawing fine lines in determining when a private claim is so special that it may be set apart from the general public interest and give the claimant power to litigate a public controversy. These inquiries are so harassing and unprofitable as to be avoided, unless Congress has explicitly cast the duty upon the courts. Against any such implication, in the absence of rather plain language, the whole course of federal railroad legislation and the relation of the Interstate Commerce Commission to it admonishes. The interests of merely private concerns are amply protected even though they must be channelled through the Attorney General or the Interstate Commerce Commission or a state Commission."

The decision of the District Court in *Detroit & M. Ry. Co.* v. *Boyne City, G. & A. R. Co.*, 286 F. 540, cited in the Court's decision above is referred to by petitioners as grounds for granting the writ. This lower court's decision was predicated upon definite allegations and proof by a competing railroad that the transportation situation would be materially changed and by a property owner that his property would be taken as the result of the projected construction of a line of railroad without authorization by the Interstate Commerce Commission. Thus, this decision, on its face, is not in conflict with the opinion of the Court of Appeals. The complete failure on the part of petitioners in this case to

either allege or prove the essential elements of legal interest or injury supplies a basic reason for the difference between the results of the two decisions. Petitioners also refer to the decision in *Farmers Grain Co.* v. *Toledo, P. & W. R. R.*, 158 F. (2d) 109 (C.C.A.-7, 1946) as only apparently in conflict with the decision of the Court of Appeals in the instant case. That decision arose out of a suit by certain shippers to secure appointment of a receiver to operate a strikebound railroad. It was not filed under Section 1(20) of the Interstate Commerce Act; did not involve an alleged abandonment contrary to Section 1(18) of that Act, and thus did not discuss or mention any question relating to whether plaintiffs had proper standing to maintain a suit under Section 1(20) of that Act. The decision is, therefore, irrelevant and is not in conflict with the decision here sought to be reviewed. By no stretch of the imagination does that decision establish any principle which could excuse petitioners' failure to allege and prove requisite jurisdictional facts.

There have been several decisions dealing with the standings of parties to maintain suits to set aside, enjoin and annul decisions or orders of the Interstate Commerce Commission issued pursuant to Sections 1(18)-(22), inclusive, and other provisions of the Interstate Commerce Act. In connection with such suits, it is significant to note that neither Section 17(9) of the Interstate Commerce Act nor the provisions of 28 U.S.C.A., §§2321-2325, inclusive, define the standing of a party which may maintain suits. However, the decisions of this court indicate that such suits may be maintained only by parties in interest who have independent legal rights which may be violated. In *Pittsburgh & W. Va. Ry.* v. *U. S.*, 281 U. S. 479, plaintiff, a minority stockholder in a railroad company, sought to set aside an order issued by the Commission granting the railroad company certificates of public convenience and necessity authorizing the abandon-

ment of station facilities and the use of facilities in a union terminal. The court held that plaintiff's stock interest did not give it standing independently to institute suit to annul the Commission's order. In *Moffat Tunnel League* v. *U. S.*, 289 U. S. 113, the Supreme Court held that the Moffat Tunnel League and the Vintah Basin Railroad League could not maintain a suit to set aside an order of the Commission authorizing one railroad to acquire control of another railroad on the grounds that such leagues were not public bodies, had no capacity to sue, and could demonstrate no legal right or interest affected by the order. See also *Home Furn. Co.* v. *United States*, 271 U. S. 456; *Boston Tow Boat Co.* v. *U. S.*, 321 U. S. 632. This Court has also held that shippers may not maintain, independently, suits to annul and set aside orders of the Commission under the rate provisions of the Interstate Commerce Act, unless such shippers submit proof of legal injury as a direct result of the order assailed. *Edward Hines Trustees* v. *U. S.*, 263 U. S. 143, 148; *Sprunt & Son* v. *United States*, 281 U. S. 249, 254.

The decisions of this Court spell out definite standards to be applied in considering whether or not petitioners have proper standing to maintain this suit for an injunction under Section 1(20) of the Interstate Commerce Act. Petitioners have specifically alleged only that an injunction should be granted restraining an alleged violation of Section 1(18) of that Act. When the situation here presented is measured by the consistent decisions of this Court, it is conclusively demonstrated that petitioners have not shown that they are parties in interest, entitled to maintain a suit of this character. Moreover, as we have seen, neither the decisions of this Court, nor the decisions of the lower Federal Courts are in conflict with the judgment of the Court of Appeals in this case. Rather, that judgment is compelled by a consistent line of decisions.

The Court of Appeals did not, as petitioners assert, hold that an individual, or two individuals, could not be a party, or parties, in interest within the scope of Section 1(20) of the Interstate Commerce Act. The Court of Appeals merely held that the petitioners here have neither alleged nor proved any interest in the continuance of respondent's previously operated passenger ferryboat service sufficient to give them standing in court to maintain a suit of this character. The foregoing analysis of petitioners' deficient allegations and the lack of any evidence of a cognizable legal injury or a special interest of a public nature supports irresistibly the judgment of the Court of Appeals.

## CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals is clearly correct and the Petition for a Writ of Certiorari should be denied.

LEIGH D. WILLIAMS,
Citizens Bank Building,
Norfolk, Virginia,

HORACE L. WALKER,
HEWITT BIAETT,
1500 First National Bank Building,
Richmond 10, Virginia,

*Counsel for Respondent.*

July 26, 1951